86-1797

No. _____

In The

Supreme Court of the United States

October Term, 1986

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RONALD H. GLANTZ
and
ANTHONY J. BUCCI, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals reversing the District Court's granting of a Motion for a New Trial conflict with *Arizona v. Washington,* 434 U.S. 497, 98 S.Ct. 824 (1978), in that it does not accord the trial judge's determination that argument to the jury was improper, the special respect to which it is entitled.

2. Does the decision of the Court of Appeals conflict with the decisions of other courts of appeals, in that it utilizes a de novo standard of review though articulating adoption of an abuse of discretion standard of review in considering a District Court decision to grant a new trial. *See, United States v. Shaffer,* 789 F.2d 682, 687 (9th Cir., 1986); *United States v. Martinez,* 763 F.2d 1297, 1312 (11th Cir., 1985).

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

———o———

Petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered on February 2, 1987 and the Memorandum and Order denying the Petition for Rehearing and Rehearing En Banc entered on March 3, 1987.

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CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit denying the Petition for Rehearing and Rehearing En Banc is annexed as Appendix A. The opinion of the United States Court of Appeals for the First Circuit reversing the District Court opinion granting a new trial is annexed as Appendix B.

JURISDICTION

The memorandum and order of the United States Court of Appeals for the First Circuit was entered on February 2, 1987. The memorandum and order denying the Petition for Rehearing and Rehearing En Banc was entered on March 3, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE V

Presentment or indictment—Double jeopardy—Self-incrimination—Due Process—Compensation for private property.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

———o———

STATEMENT OF THE CASE

The Petitioners seek certiorari from the Court of Appeals for the First Circuit reversing the decision of the District Court granting their motion for a new trial. The motion for a new trial was granted because of the Government's improper closing and rebuttal arguments.

The Petitioners in this case were charged in the United States District Court for the District of Rhode Island with extortion and conspiracy to commit extortion in that they allegedly sought to take kickbacks from a contractor with the City of Providence. Petitioner Glantz was the City Solicitor at the time of the alleged acts. The Petitioner, Bucci, was the Chairman of the Democratic Party for the City of Providence. Petitioner Bucci was also charged with violations of the Internal Revenue Code. After a jury trial of approximately three weeks' duration, the Petitioners were convicted on all counts. The District Court granted the Petitioners' motion for a new trial because of the Government's improper closing and rebuttal arguments.

The United States Government, invoking 18 U.S.C. § 3731, appealed to the United States Court of Appeals for the First Circuit from the decision of the District Court.

The Court of Appeals reversed the District Court, finding that it abused its discretion in ordering a new trial. The Court of Appeals also found no merit in defendants' arguments that other grounds supported the granting of a new trial. Both petitioners filed a petition for rehearing and suggestion for rehearing en banc which was rejected by a memorandum and order of the United States Court of Appeals for the First Circuit. There are two issues

this case raises. The first issue is whether or not the Court of Appeals decision conflicts with the mandate of this Court in *Arizona v. Washington, supra,* that special deference be accorded a District Court decision evaluating the effect of improper argument on a jury. The second issue is whether or not the Court of Appeals, while articulating adoption of an abuse of discretion standard in reviewing the District Court decision, did in fact utilize a de novo standard of review conflicting with the decisions of other Courts of Appeals which have considered this question.

The petitioners appreciate the fact this Court may view this petition as one to review a judgment that is not final. The amendment to 18 U.S.C. § 3731 permitting the government to appeal a District Court order granting a motion for a new trial has created the situation presented in this case. A petition for certiorari, in order to be timely, must be filed within sixty days of the date of denial of rehearing. This petition, therefore, had to be filed prior to appellate review of the final judgment being entered in the criminal case.[1] To avoid the possibility that the petitioners be considered to have waived their right to petition for a writ of certiorari to review the decision of the Court of Appeals, this petition is filed. If it is deemed to be premature because it is filed prior to the Court of Appeals decision on the direct appeal of this case, the petitioners request that this Court defer action on this petition until after the Court of Appeals rules on the direct appeal in this case.

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[1] After the Court of Appeals denied the petition for rehearing, the defendants in this case were sentenced. A notice of appeal was filed and the case is now before the Court of Appeals on direct appeal.

THE BASIS FOR FEDERAL JURISDICTION

In this case, the defendants were charged with federal criminal offenses which constituted the basis for federal jurisdiction in the United States District Court for the District of Rhode Island.

ARGUMENT

I. The Court Of Appeals Erred In Not According Proper Deference To The District Court Decision

Throughout the Government's closing and rebuttal arguments at the end of a three-week trial, it implicitly and explicitly shifted the burden of proof to the defense and commented on the defense invocation of the privilege against self-incrimination. The District Court found that:

> . . . The jury almost certainly was improperly swayed and influenced in its deliberations by misconceptions as to the burden of proof and privilege against self-incrimination. *See, United States v. Cox*, 752 F.2d at 746.

District Court opinion at 25.

The United States Court of Appeals for the First Circuit reversed the decision of the District Court. In doing so, the Court said:

> We do not say that the district court's conclusions were totally unfounded; rather we think the court unduly emphasized the problems that existed and, therefore, unnecessarily intervened in a process that—although imperfect—adequately protected defendants' rights.

Opinion of the United States Court of Appeals at App. 11-12. Elsewhere, the Court of Appeals said, ". . . The Govern-

ment's rhetorical approach had its problems . . ." Opinion of the United States Court of Appeals at App. 12. The Court of Appeals also said of the Government's closing argument that: ". . . the prosecutor's language obviously was susceptible to more problematic interpretations, ..." Opinion of the United States Court of Appeals at App. 18. The Court of Appeals also agreed with the District Court's assessment of the sufficiency of the evidence in the case. Opinion of the Court of Appeals at App. 20.

This Court has unmistakably insisted on appellate deference to a trial judge's evaluation of the effect of improper argument on a jury. *Arizona v. Washington,* 434 U.S. 497, 513-514, 98 S.Ct. 824, 834 (1978). In *Arizona v. Washington,* a defense lawyer made improper arguments to a jury in the context of an opening statement. In this case, the improper arguments were made in closing and rebuttal arguments by Government counsel. In *Arizona v. Washington,* this Court identified several factors militating in favor of appellate deference to the trial judge's evaluation of the impact on the jury of an improper opening argument. Those reasons are, if anything, even more compelling in the context of this case.

In *Arizona v. Washington,* this Court discussed the fact that the trial judge had an opportunity to hear the jury during voir dire examination. *Arizona v. Washington,* 434 U.S. at 513-514; 98 S.Ct. at 834. In this case, the trial judge observed the jury not only during voir dire examination, but also throughout the entire trial. In *Arizona v. Washington,* this Court commented on the great familiarity of the trial judge with the evidence and the background of the case. In this case, the trial judge sat

through the entire trial. His familiarity with the evidence could not be greater. As in *Arizona v. Washington,* the trial judge in this case "listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors." *Arizona v. Washington,* 434 U.S. at 513-514, 98 S.Ct. at 834. The trial judge's conclusion in this case was clear and unequivocal. He said the jury "almost certainly was improperly swayed and influenced." Opinion of the District Court at P. 25.

The opinion of the Court of Appeals for the First Circuit simply does not comport with the mandate of this Court in *Arizona v. Washington* directing deference to a trial judge's determination on this critical question. The point of disagreement established by the Court of Appeals is clear. It disagreed with the District Court's " . . . assessment of the prosecutor's arguments and their likely effect on the jury . . . " Opinion of the Court of Appeals at 9. Thus, the disagreement is not with the legal conclusion of the trial judge, but rather explicitly with the assessment which the trial judge made of the effect of the improper argument on the jury. The Court of Appeals explicitly eschewed determination of whether or not there was constitutional error in the Government's closing argument. Instead, the Court of Appeals noted that even if parts of the Government argument "crossed over the line of propriety" that it was an abuse of discretion to grant a new trial. Opinion of the Court of Appeals at App. 11, n.2.

In *Arizona v. Washington,* this Court not only directed deference to a District Court decision concerning the effect of improper argument to a jury, but also elaborated upon the definition of the appropriate degree of deference. This Court said:

> Thus, if a trial judge acts irrationally or irresponsibly, cf. *United States v. Jorn, supra; see Illinois v. Somerville,* 410 U.S. at 469, 93 S.Ct. at 1072, his action cannot be condoned.

Arizona v. Washington, 434 U.S. at 514, 98 S.Ct. at 835. There is nothing at all in this record to suggest the trial judge acted either irrationally or irresponsibly. His decision granting the motion for a new trial was a 39-page opinion granting the defendants' motion for a new trial on one ground and rejecting it on various other grounds proffered by the defense. It was a carefully crafted, written memorandum by a former chief judge of the Rhode Island District Court who had previously considered the question of a prosecutor's impermissible closing arguments and rejected a claim that those arguments mandated the granting of a new trial. *See United States v. Babbitt,* 683 F.2d 21, (1st Cir. 1982). As earlier references to the Court of Appeals opinion suggest, this was not a case in which the Court of Appeals felt that the District Court opinion was a radical departure from accepted norms. Indeed, though the Court of Appeals found a discussion of the strength of the Government's case unnecessary, it noted that the District Court "ably discussed the sufficiency of the evidence in this case." Opinion of Court of Appeals at App. 20. The Court of Appeals noted that the District Court's conclusion that the Government had a strong case was another factor militating against the granting of a new trial in this case.

None of this language employed by the Court of Appeals even approaches the standard set forth in *Arizona v. Washington, supra.* There is nothing to suggest that the District Court judge could "fairly be described as erratic."

Illinois v. Somerville, 410 U.S. 458, 469 (1973), describing the behavior of the trial judge in *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (1971).

In *Arizona v. Washington*, this Court held special deference must be accorded a trial judge's determination that a defense lawyer's opening argument was improper and mandated the declaration of a mistrial. This case also involves improper argument to a jury. The argument is by a prosecutor, not a defense lawyer. The argument comes at the end of a trial, not the beginning of the trial. The remedy for the improper argument is not a mistrial, but a new trial. None of these differences should in any way obfuscate the fundamental principle which this case implicates. A trial judge's determination of the effect of improper argument to a jury should be accorded great deference. This Court should grant certiorari to affirm the application of this fundamental principle in the context of this case. The differences between this case and *Arizona v. Washington* do not provide a basis for limiting the application of *Arizona v. Washington* to the facts of that particular case.

II. The Court Of Appeals For The First Circuit Erred In That It Applied A De Novo Standard Of Review To The District Court Decision Though Articulating Adoption Of An Abuse Of Discretion Standard Of Review

The Court of Appeals in this case held that the decision of the District Court ordering a new trial because of prosecutorial misconduct was reviewable only for abuse of discretion. Opinion of the Court of Appeals at App. 11, n.2. The Court of Appeals cited *Arizona v. Washington*, *supra*, in support of its position. The Court also cited

United States v. Shaffer, 789 F.2d 682 (9th Cir., 1986); *United States v. Martinez,* 763 F.2d 1297, 1312 (11th Cir., 1985); *United States v. Draper,* 762 F.2d 881, 82-83 (10th Cir., 1985).

Petitioners agree that the appropriate standard for review is one of abuse of discretion. That comports with the mandate of *Arizona v. Washington* that considerable appellate deference be shown to a trial judge's evaluation of a question of juror bias. Petitioners submit that notwithstanding the Court's theoretical acceptance of an abuse of discretion standard it in fact applied a de novo standard of review to the decision of the District Court. A close reading of the decision of the Court of Appeals supports this thesis.

Both the District Court and the Court of Appeals agreed that the standard for deciding whether or not a new trial should be granted involved an application of three primary factors:

1. The severity of the misconduct;

2. The likely effect of the trial judge's curative instruction;

3. The strength of the evidence against the defendant.

Opinion of the Court of Appeals at App. 10.

United States v. Ingraldi, 793 F.2d 408, 416 (1st Cir., 1986), cited in the opinion of the United States Court of Appeals at App. 10; Opinion of the District Court at Page 12. Each

of these factors is considered seriatim.[2] A review of these factors demonstrates the Court of Appeals did in fact apply a de novo standard of review.

A. The Severity of the Misconduct.

The District Court found that the misconduct in this case:

> . . . [B]orders on a fairly severe violation of the constitutional prohibition against comment on a defendant's failure to testify or produce documents, . . . and against shifting of the burden of proof.

Opinion of the District Court at 20. The Court of Appeals had "several problems with this conclusion. Opinion of the Court of Appeals at App. 13. A review of those differences reveals that the Court of Appeals did in fact apply a de novo standard of review in considering the District Court Opinion.

The Court of Appeals first indicates that the District Court did not give adequate consideration to the Government's right to comment on the plausibility of the defense case. Opinion of the Court of Appeals at App. 13. The Court of Appeals decision does not suggest that the District Court failed to consider the right of the Government to comment on the defense case. Indeed, the District Court explicitly considered the extent to which the prosecutor's comments could be construed as remarks on the inadequacy

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[2] *United States v. Ingraldi*, 793 F.2d 408 (1st Cir. 1986) also identifies as factors to be considered, whether the conduct was accidental or deliberate and the context in which the conduct took place. Neither of these factors considered independently played a major role in the opinion of either the District Court or the Court of Appeals.

of the defense. Opinion of the District Court at 15-18. Rather, the Court of Appeals disagreed about whether the Government arguments would be interpreted as comments on the defendants' case or as constitutionally impermissible remarks on the shifting of the burden of proof and the privilege against self-incrimination. The Court of Appeals said:

> In this case, the Government's rebuttal was to suggest that the legal fees theory was implausible because if the money had been legal fees, certainly there would have been records indicating the work that had been done. Each of the prosecutor's challenged comments about records is logically interpreted in this manner . . . .

Opinion of the Court of Appeals at App. 14.

The Court of Appeals decision focuses on how the comments could be interpreted. Yet, the area of interpretation of arguments is precisely the realm in which *Arizona v. Washington* mandates appellate deference to the conclusions of the trial justice. The Court of Appeals decision does not show that deference. It does not find that the District Court's conclusions were clearly erroneous. Indeed, it does not even find they were erroneous. Rather, the Court of Appeals offers other alternative interpretations of the effect of the Government's closing and rebuttal arguments.

In considering the Government's closing and rebuttal comments, the first argument the District Court viewed as improper was the juxtaposition of the defendant Bucci's failure to produce legal records before the Securities and Exchange Commission with his ability to produce six-year old telephone bills at trial. The District Court found that:

> . . . the implication of the prosecutor's statements taken as a whole was that the defense was able to produce a six-year old phone bill at trial, but could not similarly produce the Notarantonio client file at the SEC hearing or *at trial.*

Opinion of the District Court at 17.

The Court of Appeals did not disagree that:

> . . . a substantial portion of the government's comments would have been understood by the jury as pointing to the failure to come up with evidence supporting their legal fees theory at trial, as well as before the SEC and grand jury.

Opinion of the Court of Appeals at App. 14, n.4. Rather, the Court of Appeals opined that these comments could logically have been viewed as statements about the defense case. Indeed, the Court of Appeals went further and held that this was the most logical impact of the statements. Opinion of the Court of Appeals at App. 15. The Court of Appeals conclusion was based on its perception that the defense failure to produce records "was the primary weakness in the defense theory." Opinion of the Court of Appeals at App. 14.

The Court of Appeals decision fails to show any deference to the District Court analysis of the case. The primary weakness of the defense theory was the decision of the defendants not to testify, compounded by their failure to produce records. The District Court explicitly recognized the link between failure to produce documents and the fact that the defendants did not testify. Opinion of the District Court at 17.

The comments of the prosecutor were not about the defendants' case. As the District Court noted, some of the comments of the prosecutor "were all phrased in the

present tense" and specifically referred to the failure to produce documents at trial. Opinion of the District Court at 17.

The Court of Appeals also found:

> . . . it is far from inevitable that the jury would construe the prosecutor's comments as references to the defendants' failure to take the stand.

Opinion of the Court of Appeals at App. 16.

Again, the Court of Appeals is apparently making its own evaluation of the effect of the prosecutor's agrument on the jury. It is not asking if the District Court abused its discretion in reaching its conclusion as to how the jury would interpret the Government's arguments.

Finally, one must note what the Court of Appeals did not say. It did not say that the jury could not interpret the prosecutor's argument as a comment on the failure to testify. Nor did the Court of Appeals even say that such an interpretation was implausible or inappropriate. Rather the Court of Appeals simply disagreed about whether or not it was inevitable that the prosecutor's arguments would be construed as comments on the failure to testify.

The opinion of the Court of Appeals is predicated on reasoning which this Court has rejected in a closely allied context. In *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), this Court considered jury instructions which were ambiguous in their definition of the burden of persuasion. An argument was presented to this Court that the instructions could be interpreted in a constitutionally

permissible manner and therefore the ambiguity of the instructions did not require reversal. This Court rejected that argument. *Sandstrom v. Montana,* 442 U.S. 510 at 519, 99 S.Ct. at 2456-57. This Court held that the appropriate inquiry was what would a reasonable juror have understood. *Sandstrom v. Montana,* 442 U.S. at 515, 99 S.Ct. at 2454.

In this case, the impermissible arguments of Government counsel also focused on that critical nexus between the burden of proof and the right not to testify. The appropriate inquiry ought not to be whether there is only an unconstitutional interpretation which could be gleaned from the argument, but rather whether a juror might reasonably understand the argument in an unconstitutional manner. That the District Court found that only an unconstitutional interpretation could be understood from the argument demonstrates the strength of its conviction about the impropriety of the argument.

In evaluating the severity of the misconduct in the Government's argument, the Court of Appeals also disagreed with the opinion of the District Court that the comments on the failure to produce records would be construed as a comment on the defendant Bucci's failure to produce records. Opinion of the Court of Appeals at App. 17-18. The Court of Appeals reached this conclusion though it conceded that from its reading of the record it could not tell if technically the defendant Bucci was the only person who could be the source of the records, because in the view of the Court of Appeals the presence of other "record keeping" witnesses made it "unlikely" the jury would view the prosecutor's comments as being remarks

about the failure of the defendant Bucci to produce records. Opinion of the Court of Appeals at App. 17-18.

Once again, the Court of Appeals is substituting its judgment for the judgment of the District Court as to how the jury would respond to prosecutorial arguments. This time the apparent standard is again in reality one of de novo review. The District Court found that the defendant Bucci "was in reality the only person capable of introducing such documents." Opinion of the District Court at 20. The Court of Appeals says it is "unlikely" the jury would draw this inference. The Court of Appeals does not say the District Court is clearly erroneous nor does it suggest the trial judge acted irrationally or irresponsibly. *See, e.g., Arizona v. Washington,* 434 U.S. at 514, 98 S.Ct. at 835. It simply substitutes its judgment for the District Court's judgment.

The petitioners would further submit the Court of Appeals was wrong in its analysis of this issue. The District Court concluded that the defendant Bucci ". . . was in reality the only person capable of introducing such documents." District Court Opinion at 20. This conclusion was supported by the record. Olga Hoenkel, Bucci's secretary during some of the pertinent time period, testified as follows:

> Q During this period of time that you worked for Mr. Bucci, were there other lawyers—
>
> A No. Mr. Bucci practiced by himself.
>
> Q And how about other secretaries, were there other secretaries?
>
> A I was the only secretary.

Testimony of Olga Hoenkel at 66, Court of Appeals Appendix at 277. The point of this brief recitation of the

evidence is to show that in fact the District Court's decision not to give much credence to the government argument that other persons could have introduced the legal documents is well supported in the record. The suggestion advanced by the Court of Appeals that Bucci's wife could have been considered another possible source for the legal records is undermined by her testimony that the telephone records she introduced were brought home from the office. Testimony of Theresa Bucci at 38, Court of Appeals Appendix at 328. There was no testimony that she ever worked at the office. The testimony about the fact that the defendant Bucci practiced law with his daughter simply does not support the thesis that she could have produced the records. The evidence is that she was in college during the time of the events that were the subject of this trial and that at the time of the trial she was practicing law with her father. Testimony of Theresa Bucci at 26, Court of Appeals Appendix at 315.

B. The Likely Effect of the Curative Instructions.

This District Court held:

> . . . [T]hat the cumulative effect of the prosecutorial comments was such that no cautionary instructions would have been sufficient to cure the defects.

Opinion of the District Court at 23. The Court of Appeals did not quarrel with the instructions the District Court gave, calling them "timely and punctillious." Opinion of the Court of Appeals at App. 18. Rather, the Court of Appeals said it believed the District Court "underestimated the efficiency of its own performance." Opinion of the Court of Appeals at App. 18. Once again, the Court of Appeals substitutes its judgment for the judgment of the

District Court. It does not find anything erroneous in the District Court instructions. Nor can it criticize the District Court for not considering the effect of its instructions, for the District Court gave detailed consideration to the effect of its own instructions. Opinion of the District Court at 21-24. It simply finds that it is better able than the District Court to evaluate the District Court's own instructions.[3]

C. The Strength of the Evidence.

The final factor to be considered was the strength of the evidence. The Court of Appeals noted that its conclusions about the severity of the misconduct and the effect of the curative instructions decided the case, but noted that the District Court had ably discussed the evidence and this factor also militated against the granting of a new trial. Opinion of the Court of Appeals at App. 20. Significantly, the Court of Appeals did not predicate its decision on any consideration of the District Court's analysis of the strength of the evidence, which the District Court essentially stated consisted of a harmless error analysis. Opinion of the District Court at 21, citing *United States v. Hastings*, 461 U.S. 499, 508-512, 103 S.Ct. 1974, 1980-1982 (1983).

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[3] The Court of Appeals also took note of the fact that both defense counsel reminded the jury of who bore the burden of proof. Opinion of the Court of Appeals at 18-19. The District Court found any instructions would have been insufficient to cure the prejudice generated by the prosecutor's argument. It also listened to all the arguments of all counsel. It never even suggested the defense arguments were a sufficient palliative, and the Court of Appeals had no basis upon which to predicate this claim.

CONCLUSION

Petitioners request that this Petition be granted.

Respectfully submitted,

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Anthony J. Bucci, Sr.

April, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1735.

UNITED STATES,

Appellant,

v.

RONALD H. GLANTZ, ANTHONY J. BUCCI,

Defendants, Appellees.

Before

CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER, TORRUELLA and
SELYA, *Circuit Judges*

ORDER OF COURT

Entered: March 3, 1987

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing, and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service, and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that both the petition for rehearing and the suggestion for rehearing en banc be, and the same hereby are, denied.

By the Court:
Francis P. Scigliano
Clerk.

[cc: Messrs. Caldwell and Mann]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1735

UNITED STATES OF AMERICA,

Appellant,

v.

RONALD H. GLANTZ and ANTHONY J. BUCCI,

Defendants, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Raymond J. Pettine, *Senior U.S. District Judge*]

Before

Coffin, Bownes and Torruella,

Circuit Judges.

Christopher G. Caldwell, with whom John M. Campbell, Criminal Division, Department of Justice, *Stephen S. Trott,* Assistant Attorney General, and *Lincoln C. Almond,* United States Attorney, were on brief for appellant.

Robert B. Mann with whom Anthony J. Bucci, Jr. was on brief for appellees.

February 2, 1987

COFFIN, *Circuit Judge*. This case requires us to make a particularly difficult determination: whether the district court erred in deciding that defendants Ronald Glantz and Anthony J. Bucci were entitled to a new trial because of improprieties in the government's closing and rebuttal arguments. After a close and careful scrutiny of the record, we conclude that the district court, although understandably concerned about "[t]he fundamental rights at issue," nevertheless erred when it granted the new trial. We therefore reverse.

I.

The indictment in this case charged defendants with extorting $77,350 from James Notarantonio through a kickback scheme involving Notarantonio's lease of garbage trucks to the City of Providence, Rhode Island. At the time of the alleged extortion, defendant Glantz was the City Solicitor of Providence and defendant Bucci was an attorney in private practice. Bucci's brother-in-law, Clement Cesaro, was then director of the Providence Department of Public Works, a position he obtained with Bucci's assistance.

The government's evidence at trial was presented primarily through Notarantonio's testimony. Notarantonio testified that Glantz solicited from him the lease used in the kickback scheme, and that Bucci was able to arrange for an inflated contract between Notarantonio and the city because of the position held by Bucci's brother-

in-law Cesaro at the Department of Public Works. The government's evidence also showed that Cesaro departed from normal city procedures when he requested unlimited discretion to negotiate the garbage truck lease with Notarantonio. The lease itself also reflected a deviation from the norm, lacking a signature line for the mayor and instead containing Cesaro's signature. The government also presented charts to the jury showing the correlations by date and amount of seventeen payments from the City to Notarantonio and eight supposedly related payments from Notarantonio to Bucci.

During cross-examination of Notarantonio, Bucci's attorney sought to establish that Bucci had performed legal and consulting services for Notarantonio for which he earned the $77,350. The defense also presented the testimony of a number of other witnesses, some of whom discussed work Bucci supposedly did for Notarantonio. The government sought to discredit the legal fees theory, particularly emphasizing that Bucci had no records of such work. The government read into evidence sworn testimony given by Bucci before the Securities and Exchange Commission in 1983, in which Bucci responded to a subpoena duces tecum for the production of records of work done for Notarantonio or Notarantonio's company by turning over documents showing only unreimbursed expenses of less than a thousand dollars.

Defendants were convicted after a three-week trial of conspiracy to extort kickback payments from Notarantonio and of the substantive crime of extorting those payments. Defendant Bucci also was convicted of conspiracy to conceal the kickback scheme from the Internal Revenue Ser-

vice and of preparing two false documents for presentation to the IRS. Defendants moved for a new trial on four grounds: insufficient evidence, inadequate jury instructions, grand jury abuse, and closing and rebuttal arguments by the government that impermissibly shifted the burden of proof and commented on the defendants' failure to take the stand. The district court rejected the first three of these grounds, but granted a new trial in the belief that the prosecutor's arguments improperly influenced the jury. On appeal, the government claims that there was nothing improper in its argument and, even if there was some impropriety, any error was either cured through instruction or harmless.

II.

We preface our discussion with a description of the allegedly offending prosecutorial statements. Shortly after the prosecutor began his argument, immediately after he detailed the charges listed in the indictment, he made the following comments:

> You must decide, ladies and gentlemen, that money $77,350, it's either legal fees or kickbacks. There's no other alternative. It's one or the other. Legal fees or kickbacks. And you have to make that decision."

This theme—"legal fees or kickbacks"—was raised repeatedly during the closing statement, and much of the prosecutor's argument was directed toward attacking the notion that the money could be legal fees. In evaluating the evidence presented by the defense that the payments were legal fees, the prosecutor posed the questions, "Who else did you hear from? Who else did the defense call on

this issue of legal fees?" The prosecutor specifically honed in on the defendants' failure to produce documents showing that the money was legal fees. At one point, for example, the prosecutor stated:

> They [defendants] bring in a six year old phone bill, ladies and gentlemen. But in 1983 they can't produce any records for the S.E.C. about the work that he did. Not a one. If such a file existed she [Bucci's secretary] would have guarded it with her life. As would any lawyer.

After an objection by defendants' lawyers based on shifting the burden of proof, and a brief curative instruction by the court,[1] the prosecutor continued:

> Ladies and gentlemen, isn't it obviously true, lawyers don't throw out their research, they don't throw out their final work product. It doesn't make sense. She [the secretary] told you later he did other work involving exporting and importing for another client. If you throw it out after you do it once you've got to start from scratch again. Nobody does that, ladies and gentlemen. You saw this man during the course of this trial, why he's doing it right now, even as we speak. Notes, every day during the course of this trial he took notes. Paper, paper, paper, that's what lawyers are all about, ladies and gentlemen. But he doesn't have a document. It doesn't make any sense. You know, ladies and gentlemen, we're talking about $77,350 worth of allegedly legal fees. Now, we don't know what Mr. Bucci charged per hour then. We don't know. If it were $100 an hour, you're looking at 773 hours. It's almost 20 weeks, that's five months of legal work. No files, no research, it's just unbe-

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[1] The court told the jury: "I've instructed you as to how you regard the arguments by counsel and you just apply those instructions when you evaluate it. All right."

> lievable ladies and gentlemen, but that's what this case is all about. Legal fees or kickbacks.

The prosecutor then made a few more remarks denigrating the legal fees defense before concluding his argument. After a short recess, defendants' counsel moved for a mistrial on the ground that the prosecutor had impermissibly "shifted the burden throughout the argument." The district court denied the motion, but gave the following cautionary instruction to the jury:

> You know, Members of the Jury, I told you in the beginning and I tell you again, that you are the judges of the facts in this case and you alone decide what the facts are. If counsel in argument refer to facts and you have no recollection of them, or there may be a challenge as to whether such facts were said. Well, if they're not in the record and you don't remember them, they just can't be. You have to recall the facts, you have to find the facts, independent of what counsel has told you. And so it is on the burden of proof. I told you from the beginning that the burden is on the government to prove the case in all its respects. And these principles you have to keep in mind when you're in your jury room, as you listen to these arguments. All right, let us proceed.

The emphasis on defendants' failure to produce records was repeated, and objected to twice more during the prosecutor's rebuttal argument. In attempting to rehabilitate the credibility of Notarantonio, the prosecutor suggested that it would be implausible for Notarantonio to have fabricated the kickback story if the money were actually legal fees because legal fees would be easy to prove.

> You know, there's one other thing that I find very interesting, the notion that Mr. Notarantonio made up a lie that these were in fact legal fees, these checks,

> but that he decided he was going to lie about that. What a crazy thing to lie about. Now, Ladies and Gentlemen I don't know if any of you have ever been to lawyers, but you've certainly been to other professionals, you've certainly been to doctors, you've certainly been to dentists. Doctors, and lawyers, and Dentists, they don't have trouble showing what work they did and when they did it. Why they were able to bring in records from six years ago for Doctor Murray—

Defendants' lawyers then objected, referring to "the same objection," the improper shifting of the burden of proof. The court gave another brief cautionary instruction, reminding the jury of the government's burden of proving the case beyond a reasonable doubt and noting that the "[d]efense doesn't have to prove anything or disprove anything." The prosecutor then continued:

> Thank you, your Honor. We accept that 100%, the government has the full burden here. My point is a simple one. If Mr. Notarantonio is telling a lie, if those were in fact legal fees, he was taking a big risk because he had to assume that if those were legal fees, which is the contention, that if those were legal fees, boy he could be blown right out of the water, it would be very simple to show that those were legal fees, and to establish that he was lying. It doesn't make sense that he'd lie about such a thing.

Defense counsel again objected and, at a bench conference, argued for the first time that the prosecutor's argument improperly touched upon the defendants' failure to take the stand as well as improperly shifted the burden. The court again denied a mistrial, but gave the following curative instruction:

> Again, Members of the Jury, the burden of proving a case rests upon the United States Government. The defendants don't have to prove anything, they don't have to disprove anything, they don't have to produce anything. For you to be—for you to resolve this case as to guilt or innocence, you look to the evidence. However, you look at this evidence in its entirety. And I will instruct you more completely on that. And just as I told you about the presumption of innocence, I told you now about the burden of proof, and so I will tell you also, during the instructions that a defendant does not have to testify in a case, and no inferences is to be drawn from that kind of testimony, it's the concept and the philosophy of our criminal jurisprudence that underlines all of these cases that you have to keep in mind.

III.

We have recently, and repeatedly, stated that:

> In deciding whether a new trial is required—either because prosecutorial misconduct likely affected a trial's outcome or to deter such misconduct in the future—we consider the severity of the misconduct, whether it was deliberate or accidental, the context in which it occurred, the likely curative effect of the judge's admonitions and the strength of the evidence against the defendant.

United States v. Ingraldi, 793 F.2d 408, 416 (1st Cir. 1986); *United States v. Cox*, 752 F.2d 741, 745 (1st Cir. 1985); *United States v. Capone*, 683 F.2d 582, 586 (1st Cir. 1982). In applying this test, the district court found "misconduct" that bordered on "a fairly severe violation of the constitutional prohibition against comment on a defendant's failure to testify or produce documents . . . and against shifting of the burden of proof." The court held

that the cumulative effect of repeated prosecutorial comments could not be rebutted by cautionary instructions, and that, given the context and frequency of the statements at issue, "the jury almost certainly was improperly swayed or influenced in its deliberations by misconceptions as to the burden of proof and privilege against self-incrimination."

We disagree with this assessment of the prosecutor's arguments and their likely effect on the jury to such an extent that we feel compelled to conclude that the district court's decision to grant a new trial represents an abuse of discretion.[2] We do not say that the district court's con-

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[2] Although the government is correct that a *de novo* standard of review would apply to the legal question of whether the prosecutor's argument constituted misconduct, we conclude that the decision to grant a new trial because of any misconduct is subject to review only for abuse of discretion. The trial judge

> has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Arizona v. Washington, 434 U.S. 497, 514 (1978). *Cf. United States v. Indelicato*, 611 F.2d 376, 387 (1st Cir. 1979) (involving motion for new trial on weight of the evidence grounds) ("[m]otions for a new trial are directed to the broad discretion of the trial judge, who may weigh the evidence and evaluate the credibility of witnesses in considering such a motion.") *See United States v. Shaffer*, 789 F.2d 682, 687 (9th Cir. 1986); *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985); *United States v. Draper*, 762 F.2d 81, 82-83 (10th Cir. 1985).

We see no need to dissect this case, however, by determining first, whether there was constitutional error and, second, whether that error warranted a new trial. Rather, even if some aspects of the government's argument crossed over the line of propriety, we conclude that it was an abuse of discretion to grant the new trial.

clusions were totally unfounded; rather, we think the court unduly emphasized the problems that existed and, therefore, unnecessarily intervened in a process that—although imperfect—adequately protected defendants' rights. This is not an " 'exceptional case[ ],' " *United States v. Leach*, 427 F.2d 1107, 1111 (1st Cir. 1970), in which a new trial is needed to avoid " 'a miscarriage of justice,' " *United States v. Indelicato*, 611 F.2d 376, 387 (1st Cir. 1979).

We do not reach this conclusion lightly. To be sure, the government's rhetorical approach had its problems. In the abstract, the "kickbacks or legal fees" theme could be understood to suggest that the jury needed to decide whether the government had proven the money was kickbacks or whether the defendants had proven the money was legal fees. The jury's actual task, of course, was to decide not which theory was more convincing but only whether the government had proven beyond a reasonable doubt that the money was illegal payoffs.

Interestingly, the district court found no problem with the "kickbacks or legal fees" theory per se, and defendants never objected to the prosecutor's use of this particular language. Undoubtedly, this was because the theory, although potentially misleading with regard to the burden of proof, accurately described the evidence in the case. Because the defendants had specifically tried to rebut the government's evidence of kickbacks by showing that the money actually had been paid to Bucci as legal

fees, the jury, in fact, had been presented with a case of "kickbacks or legal fees."[3]

What instead bothered the court and the defendants were the prosecutors' statements stressing the defendants' failure to produce documents to prove the truth of their theory that the payments were legal fees. Although the district court apparently felt that it was a close call as to whether each troublesome aspect of the arguments individually violated defendants' rights, it was convinced that the cumulative impact of the challenged statements added up to a serious violation of defendants' rights.

We have several problems with this conclusion. First, with regard to shifting the burden of proof, we think the district court gave short shrift to the government's right to comment on the plausibility of the defense theory. In *United States v. Savarese*, 649 F.2d 83, 87 (1st Cir. 1981), we recognized that the government is entitled, to some extent, to comment on a defendant's failure to produce evidence supporting the defense theory of the case.

> [D]efendant chose to call witnesses and put forth an alibi. Having done so, he had no right to expect the government to refrain from commenting on the quality of his alibi witnesses *or from attacking the weak evidentiary foundation on which the alibi rested.*

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[3] Defendants also did not object to the posing of questions such as "Who else did you hear from? Who else did the defense call on this issue of legal fees?" They later argued, however that these questions directed the jury's attention to Bucci's failure to testify. We agree with the district court that these questions would not have been understood by the jury as referring to Bucci's failure to testify. Certainly, there is no "miscarriage of justice" warranting a finding of plain error. *See United States v. Young*, 470 U.S. 1, 16 (1985).

Id. (emphasis added). In this case, the government's rebuttal was to suggest that the legal fees theory was implausible because if the money had been legal fees, certainly there would have been records indicating the work that had been done. Each of the prosecutor's challenged comments about records is logically interpreted in this manner: the contrast between the absence of legal fee records and the existence of a six-year-old phone bill; the reminder that "[d]octors, lawyers, and dentists . . . don't have trouble showing what work they did and when they did it"; the implicit assertion during the rebuttal argument that it would be very easy to show that Notarantonio was lying because if the money were legal fees there would be records.[4]

The district court stated that "[t]he prosecution commentary was aimed not only at the *weaknesses* in the defense evidence, but also at the absence of defense records." (Emphasis in original.) But the *absence* of records was the primary weakness in the defense theory. Moreover, the government had presented affirmative evidence, in the form of Bucci's own earlier testimony before the SEC, that the records did not exist, and it was logical for the

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[4] The government argues that its references to the absence of records were linked to Bucci's failure to produce documents in 1983 before the SEC, and would not have been understood as a comment on his failure to produce documents at trial. We have no doubt that a substantial portion of the government's comments would have been understood by the jury as pointing to the failure to come up with evidence supporting their legal fees theory at trial, as well as before the SEC and grand jury. This conclusion does not, however, determine the propriety of the prosecutor's closing and rebuttal arguments.

government to highlight this evidence.[5] We therefore disagree with the district court's conclusion that these comments "could only have been understood by the jury as directed to the failure of the defense to produce documents . . . ." Instead, we think the most logical impact of these comments was to urge the jury to reject legal fees as a palusible alternative to the evidence of kickbacks presented by the government.[6]

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[5] Defendants argue that the SEC investigation was limited in scope to Bucci's efforts on behalf of Notarantonio's business, the Inge Company, and that the failure to produce documents before the SEC does not indicate that no records existed of other legal work Bucci did for Notarantonio. Whatever the primary scope of the SEC probe, however, the fact remains that the subpoena sought "any and all records of any services rendered to and/or for Inge Company, Incorporated of Providence, Rhode Island *and/or James Notarantonio* . . . ."

[6] The government at one point in its closing argument spelled out the interrelationship between the government's burden of proof and the plausibility of the defense theory:

> You know, as you were told in the very beginning and several times during the course of the trial, the defendants never, never have to prove anything. It's the government's burden, a burden we welcome. But you know, when the defendants put on a defense you've got to consider their evidence too. Look at their evidence, let's weigh its credibility, decide does it persuade you or not. Well, defendant Bucci claimed that these were legal fees and he went to great lengths to prove this. He cross-examined Mr. Notarantonio for some three days. They brought in Miles Turkat, they put Michael Bucci on the stand, put Mrs. Bucci on the stand, and you heard from Olga Henkel. All done to show that this was extensive legal work. They also called Mr. Shanahan yesterday. Let's examine this evidence. Let's look at it and decide if it supports the claim that these are legal fees. Or if it's not so weak that it shows that these are really kickbacks.

(Continued on following page)

Second, we also think it far from inevitable that the jury would construe the prosecutor's comments as references to the defendants' failure to take the stand. Although this circuit proscribes even indirect prosecutorial comment on a defendant's failure to testify, *United States v Lavoie,* 721 F.2d 407, 408 (1st Cir. 1983), the standard nevertheless is

> "whether, in the circumstances of the particular case, 'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' "

United States v. Monaghan, 741 F.2d 1434, 1437 (D.C. Cir. 1984) (quoting *United States v. Williams,* 521 F.2d 950, 953 (D.C. Cir. 1975). *See also United States v. Babbitt,* 683 F.2d 21, 24 (1st Cir. 1982) ("the prosecutor's comments were not such that the jury would 'naturally and necessarily' construe them to refer to a defendant's failure to testify."); *United States v. Savarese,* 649 F.2d at 87 ("The prosecutor's statements here could not reasonably be construed by the jury as 'intentionally aimed at commenting upon defendant's failure to take the stand,' *United States v. Kubitsky,* 469 F.2d 1253, 1255 (1st Cir. 1972) . . . .")

(Continued from previous page)

Although a prosecutor's prefatory statement acknowledging the burden of proof may suggest recognition of "relevant danger lurking in the [remarks] that followed," *United States v. Cox,* 752 F.2d at 745, it would be wrong to presume impropriety simply because the prosecutor has explicitly acknowledged the government's burden. We do not believe the prosecutor's comments in this case were an intentional prelude to misconduct.

We are covinced that the inference of a comment on the defendants' failure to testify is far too attentuated in this case to warrant a new trial. The prosecutor's statements focused specifically on the apparent non-existence of certain documents arguably crucial to the defense theory rather than generally on the defendant's failure to rebut the government's case. Thus, the emphasis in this case was not on the defendant's silence but on the weakness of his chosen defense. *Compare United States v. Flannery,* 451 F.2d 880, 882 (1st Cir. 1971) (prosecutor's reference to "uncontradicted" government testimony impermissible, when "contradiction" would have required defendant to take the stand) *with United States v. Lavoie,* 721 F.2d at 408 (no reversible error found in comment, " . . . you might ask yourself what has Mr. Lavoie put between himself and the truth?) *and United States v. Babbitt,* 683 F.2d 21, 23-24 (1st Cir. 1982) (no error in comment, "While you search out the truth you may wish to ask yourself, 'Who has appeared before me in the form of a witness?' ").

Defendants argue that the statements questioning the lack of records must have been understood by the jury as a reference to Bucci's failure to testify because Bucci was the only witness who could have produced the legal documents concerning Bucci's work for Notarantonio. Even if Bucci were the only one who could authenticate the documents, this fact does not transform an attenuated inference into one that "naturally and necessarily" would be taken as a comment on his silence. Moreover, even if technically defendants were correct that Bucci was the sole competent witness on the documents—and our reading of the record does not tell us either way—we think the existence of other "recordkeeping" witnesses makes it un-

likely that the jury would have viewed the challenged comments as pointing to defendants' silence at trial rather than to the lack of evidentiary support for the defense theory. Olga Hoenkel, Bucci's former legal secretary, testified that she had typed documents for Notarantonio and she, or a possible successor, therefore would have been likely candidates to testify on the supposed legal records. In addition, Bucci's wife testified about a telephone record introduced at trial, and the jury could have considered her as another possible source for the legal records. Finally, there also was evidence that Bucci practiced law with his daughter, and the jury could have focused on her as a possible records custodian.

Although the prosecutor's language obviously was susceptible to more problematic interpretations, we find the Supreme Court's language in *Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974) to be particularly appropriate here:

> [A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Moreover, even if some damage was done by the prosecutor's comments, the district court lived up to its own high standard of giving timely and punctilious curative instructions. We believe it underestimated the efficacy of its own performance. Three times upon defense objection the court instructed the jury that the burden was on the government to prove the case, and the court also told the jury that the defense need not prove or disprove anything

and had no obligation to produce anything. In addition, the court's preliminary instructions before trial, and five paragraphs of its instructions at the close of the trial before deliberations, blanketed the specific occasions with clear before and after references to the burden of proof and the defendant's right not to testify or to produce any evidence.

In addition to the court's instructions, it is worth noting that the defense lawyers also specifically responded to the "kickbacks or legal fees" theme of the prosecution. Near the beginning of his closing argument, Bucci's lawyer made the following comments:

> [The prosecutor] says that the question is are these legal fees or are they payoffs? That's not the question. That is not, not, not the que[s]tion. The question is are these payoffs and are they payoffs beyond reasonable doubt? The defendants in this case have no burden to prove that these are legal fees. My only reason for standing here is to persuade you that the Government has failed to prove beyond reasonable doubt that these are payoffs.

He returned to that theme toward the end of his argument.

> So you ask yourself, well, can we honestly believe that these are legal fees? And once again I remind you, it's not my burden to show you they're legal fees. The question is has the Government prove[n] that they're payoffs beyond reasonable doubt.

Glantz' attorney similarly referred to the burden of proof, and near the end of his argument observed that "the key in this defense" is the government's burden of proving the case beyond a reasonable doubt. Thus, the jury in

this case was reminded repeatedly of the government's burden and of the defendants' right to remain silent.

Although our previous discussion disposes of the case, for the sake of completeness, we note that the final prong of the standard for a new trial set out in our cases—the strength of the evidence against the defendants—also militates against a new trial here. The district court ably discussed the sufficiency of the evidence in this case, and we see no reason to differ from its conclusion that "the government certainly had a strong case against the defendants."

Thus, we are convinced that no significant error attended defendants' convictions. While we reiterate our strong conviction that prosecutors should exercise "a heightened sensitivity," *United States v. Laboie,* 721 F.2d at 409, so as to avoid improper comments potentially harmful to defendants, this is not a case in which injustice occurred. The substantially appropriate nature of the prosecutor's comments, the repeated correction of any possible deficiencies, and the strong government case all lead to the conclusion that the district court abused its discretion in taking the rare step of ordering a new trial.

IV.

We find no merit in the defendants' arguments that other grounds support the grant of a new trial. We agree with the district court's treatment of defendants' challenges to the sufficiency of the evidence and the adequacy of the jury instructions. Defendants' claim of error arising from the prosecutor's comments regarding Bucci's in-court behavior was not made to the district court, and

therefore must be evaluated under the "plain error" standard. *United States v. Young,* 470 U.S. 1, 15-16 (1985); *United States v. Collatos,* 798, F.2d 18, 20 n.5 (1st Cir. 1986). Although we do not condone such argument, *see Borodine v. Douzanis,* 592 F.2d 1202, 1210-11 (1st Cir. 1979), we have no doubt that, viewed in context, the comment did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice," *Young,* 470 U.S. at 16. The reference to Bucci's note-taking was simply one variation of the theme stated repeatedly by the prosecutor that the legal fees defense was implausible because Bucci, a lawyer, would have made records showing the legal work performed for such fees. Any arguable prejudice flowing from the prosecutor's comment could have been remedied by a curative instruction given upon timely objection. *See Borodine,* 592 F.2d at 1211.

For the foregoing reasons, the judgment of the district court is vacated, and the case is remanded with directions to reinstate the jury verdict and for other proceedings consistent with this opinion.

No. 86-1797

In the Supreme Court of the United States

OCTOBER TERM, 1986

RONALD H. GLANTZ AND ANTHONY J. BUCCI, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in reversing an order granting a new trial.

Following a jury trial in the United States District Court for the District of Rhode Island, petitioners were convicted of conspiracy to extort kickback payments and of the substantive crime of extorting those payments, in violation of 18 U.S.C. 1951. Petitioner Bucci was also convicted of conspiracy to conceal the kickback scheme from the Internal Revenue Service, in violation of 18 U. S. C. 371; and of preparing two false documents for presentation to the Internal Revenue Service, in violation of 26 U.S.C. 7206(2). On July 2, 1986, the district court granted petitioners' motion for a new trial because of alleged improprieties in the prosecutor's closing and rebuttal arguments.

On February 2, 1987, the court of appeals reversed (Pet. App. 3-21). It concluded that the "substantially appropriate nature of the prosecutor's comments, the repeated correction of any possible deficiencies, and the strong government case all lead to the conclusion that the district court abused its discretion" in ordering a new trial (*id.* at 20).

After the court of appeals' decision, the district court sentenced petitioners. They then noted an appeal of their convictions to the court of appeals. That appeal is now pending. Petitioner Bucci also filed a motion for a new trial on the ground of newly discovered evidence. That motion is now pending in the district court.

Petitioners contend (Pet. 5-9) that the court of appeals erred in not according sufficient deference to the trial court's conclusion that a new trial was warranted. Petitioners also contend (Pet. 9-18) that the court below, although articulating an abuse of discretion standard of review, incorrectly applied a de novo standard of review to the trial court's order. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion for a new trial. If the court of appeals were to reverse petitioners' pending appeal from their judgments of conviction and remand for a new trial, their claims might be mooted by an acquittal following a second trial on the merits. If, on the other hand, the court of appeals affirms their convictions, petitioners will then be able to present their present contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of final judgments of

conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1987

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*Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.